STATE OF MICHIGAN

IN THE SUPREME COURT

THE PEOPLE OF THE STATE OF MICHIGAN,	Supreme Court No.
Plaintiff-Appellee,	Court of Appeals No. 224937 Opn 11/2/01
v.	
JAMASA Z. DERRING,	Circuit Court No. 99-01128-FC
Defendant-Appellant. /	Allegan H. Beach

NOTICE OF HEARING

DELAYED APPLICATION FOR LEAVE TO APPEAL

120696

LOWER COURT ORDERS

DAPC

AFFIDAVIT AS TO DELAY

4/22

PROOF OF SERVICE

21329

ELLIOT D. MARGOLIS (P-28078)
Attorney for Defendant-Appellant
2304 E. 11 Mile Rd.
Royal Oak, MI 48067
(248) 547-7888

STATE OF MICHIGAN

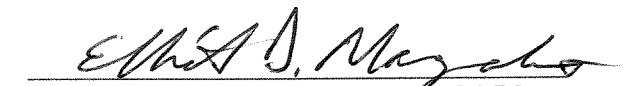
IN THE SUPREME COURT

THE PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	Supreme Court No.
v.	Court of Appeals No. 224937
JAMASA Z. DERRING, Defendant-Appellant.	Trial Court No. 99-01128-FC

NOTICE OF HEARING

TO: FREDERICK ANDERSON, Prosecuting Attorney
Attn: Appellate Section
County Bldg.
113 Chestnut St.
Allegan, MI 49010

PLEASE TAKE NOTICE THAT the attached **Delayed Application for Leave to Appeal** will be submitted to the Court on Tuesday, January 23, 2002, or as otherwise ordered.



ELLIOT D. MARGOLIS P-28078
Attorney for Defendant-Appellant
2304 E. 11 Mile Rd.
Royal Oak, MI 48067
(248) 547-7888

Dated: December 21, 2001

TABLE OF CONTENTS

INDEX OF AUTHORITIES

JURISDICTIONAL STATEMENT

The final order was entered January 24, 2000. Appeal of right was taken to the Court of Appeals on January 26, 2000. The Court of Appeals issued an opinion on November 2, 2001, and this Delayed Application for Leave to Appeal is made pursuant to MCR 7.302(C)(3).

STATE OF MICHIGAN

IN THE SUPREME COURT

THE PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v.

JAMASA Z. DERRING,
Defendant-Appellant.
_____/

Supreme Court No.

Court of Appeals No. 224937

Allegan County Circuit No. 99-01128-FC

DELAYED APPLICATION FOR LEAVE TO APPEAL

NOW COMES Defendant-Appellant, JAMASA Z. DERRING, by and through his attorney, Elliot D. Margolis, P-28078, and prays this Honorable Court will grant his Delayed Application for Leave to Appeal, saying in support thereof:

1. That Defendant-Appellant, JAMASA Z. DERRING (hereafter "Mr. Derring"), was on December 13, 1999, convicted in the Allegan County Circuit Court by jury of three counts of first-degree premeditated murder, MCL 750.316(1)(a), and three counts of possessing a firearm in the commission of a felony, MCL 750.227b, the Honorable Harry A. Beach, Circuit Judge, presiding. Further, that Mr. Derring was thereafter sentenced on January 21, 2000, to the mandatory three concurrent natural life prison terms, preceeded by a two-year term for the firearm convictions (Sentence transcript, hereafter "ST", at 12-13).

2. That Mr. Derring appealed of right to the Court of Appeals (Docket No. 224937), which affirmed his convictions

in an unpublished opinion issued November 2, 2001 (a copy of which is attached hereto as Appendix A).

3. That Mr. Derring raised five issues in the Court of Appeals involving:

a) the Trial Court's allowance of highly prejudicial hearsay evidence through the testimony of four witnesses;

b) the Trial Court's allowance of 'prior bad acts' evidence, concerning a prior murder;

c) the ineffective assistance of trial counsel through counsel's negligent elicitation of damaging testimony in cross-examination;

d) and e) prosecutorial misconduct which deprived Mr. Derring of a fair trial, and consisting of 1) the use of perjured testimony; and 2) an improper shifting of the burden of proof concerning an alibi;

4. That the Court of Appeals found no error as alleged, except for the Trial Court's allowance of hearsay from one of the witnesses, which the Court of Appeals found to be an abuse of discretion, but one harmless in its effect upon the verdict (Slip Opinion, p. 4).

5. That Mr. Derring believes the Opinion of the Court of Appeals is clearly erroneous and requires this Court's review or peremptory reversal for dismissal or remanding for a new trial.

QUESTIONS PRESENTED FOR REVIEW

6. That this cause presents important questions of law and is of significant public interest:

I. WAS THE TRIAL COURT'S ALLOWANCE AND ADMISSION OF HEARSAY--PURSUANT TO THE "CATCHALL" EXCEPTION IN MRE 804(b)(6)--WITHOUT SUFFICIENT INDICIA OF RELIABILITY, AND WHICH STATEMENTS WERE OF A NON-AVAILABLE (DECEASED) DECLARANT IMPLICATING THE DEFENDANT IN A PRIOR MURDER, AN ABUSE OF DISCRETION WHICH DENIED MR. DERRING OF HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO A FAIR TRIAL?

Defendant-Appellant answers "yes"

Plaintiff-Appellee would answer "no"

The Trial Court answered "no"

The Court of Appeals found an abuse concerning only one of the four challenged statements, as noted above;

II. WAS THE ADMISSION OF PRIOR BAD ACTS EVIDENCE CONCERNING A PRIOR MURDER--ADMITTEDLY RELEVANT TO THE MATERIAL ISSUE OF MOTIVE--AN ABUSE OF DISCRETION WHICH DENIED MR. DERRING HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO A FAIR TRIAL, AS THE PROBATIVE VALUE OF THE EVIDENCE WAS OUTWEIGHED BY THE UNFAIR PREJUDICE TO THIS DEFENDANT?

Defendant-Appellant answers "yes"

Plaintiff-Appellee would answer "no"

The Trial Court answered "no"

The Court of Appeals answered "no"

III. WHETHER DEFENDANT WAS DENIED HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL AND A FAIR TRIAL, WHERE COUNSEL APPARENTLY NEGLIGENTLY ELICITED DAMAGING INFORMATION DURING CROSS-EXAMINATION OF A WITNESS?

Defendant-Appellant answers "yes'

Plaintiff-Appellee would answer "no"

The Court of Appeals answered "no"

IV. WAS MR. DERRING DENIED HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO A FAIR TRIAL THROUGH THE PROSECUTION'S USAGE OF PERJURED TESTIMONY?

Defendant-Appellant answers "yes'

Plaintiff-Appellee would answer "no"

The Court of Appeals answered "no"

V. WAS MR. DERRING DENIED HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO A FAIR TRIAL THROUGH THE PROSECUTOR'S IMPROPER SHIFTING OF THE BURDEN OF PROOF?

Defendant-Appellant answers "yes"

Plaintiff-Appellee would answer "no"

The Court of Appeals answered "no"

STATEMENT OF FACTS

7. **Trial Testimony.** The instant case involves the April 1, 1999, shooting deaths of three teenaged victims, Dustin Sherrell, Darla Sherrell, and Jonathan Edwards, all of whom had been close friends of Mr. Derring. The case also referenced (as a prior bad act and the basis for Mr. Derring's Issue II herein) a murder which occurred on February 20, 1999, wherein Antonio Flores was shot and killed. Evidence presented at trial suggested that the murder of Mr. Flores had been committed by Dustin Sherrell and Mr. Derring. Mr. Sherrell's subsequent comments to others about that shooting and his and Mr. Derring's involvement in that shooting, formed the basis for the Prosecution theory of motive for Mr. Derring to have committed the instant three murders. The comments made by

Mr. Sherrell to his cousin Joseph Green, his cousin Nicole Lawrence, his former girlfriend Jessica Jones, and in the presence of family friend George Segelstrom, Jr., are the statements at issue in Mr. Derring's Issue I.

Joseph Green testified that he usually saw his cousin about three times per week, and that Mr. Derring was usually present (Trial transcript, hereinafter "TT, vol. II, 243-245). He had on previous occasions seen Mr. Derring and his cousin Dustin with handguns, in .22 and .25 calibers, and that Mr. Derring frequently carried the guns; also, he had seen Mr. Derring target shooting with the .22 several weeks before the murders (TT II, 249-252). Mr. Green was permitted to recount a conversation he had had with Dustin Sherrell two days after the murder of Mr. Flores. Dustin told Mr. Green that he had shot Mr. Flores, and that Mr. Derring assisted in beating up a companion of Flores (TT II, 255-258). Mr. Derring was present during Dustin's statements, but did not speak. Mr. Green did not question Dustin about his comments or the incident, as he did "not want to know" (TT II, 255; 258). Dustin changed his story two days later when he again spoke to Mr. Green; on that occasion Dustin told Mr. Green he had been "joking", and had not really shot anyone (TT II, at 261).

Nicole Lawrence testified that in a conversation with Dustin he expressed concern over Mr. Derring dating Darla Sherrell, and told Nicole that Mr. Derring was a "crazy

type" person who had "shot some Mexican guy" a month earlier (TT II, 313-317).

Jessica Jones testified that she would usually see Mr. Derring with Dustin three times per week, and that she had been with them at the Sherrell trailer on the night Mr. Flores was killed. Mr. Derring usually carried two guns (TT II, 188-191). She testified that during that evening Mr. Derring left for a period of time, but returned; he and Dustin then left together at about 9:00 PM and were gone about an hour or hour and one-half (TT II, 178-182). When they returned to the trailer, Dustin was very agitated, and Mr. Derring appeared nervous; at some later point that evening she said Mr. Derring mentioned involvement in a shooting, without specifying or describing any personal participation (TT II, 183-186). Subsequently, Dustin apparently told her that Mr. Derring had shot someone (TT II, 187-188).

George Segelstrom, Jr. testified that he was a friend of the Sherrell family, and daily drove Mr. and Mrs. Sherrell to and from work. About one week before the instant murders, while giving a ride to Dustin and Mr. Edwards, he overheard Dustin say he could not believe that he shot him; when asked who?, Dustin replied "Mr. Derring" (TT II, 293-295).

Police witnesses described finding eight .22 casings at the crime scene, and a .25 casing; several slugs were

recovered from the bodies, of both .22 and .25 caliber; witnesses described comparisons of the casings with spent casings found at Mr. Derring's residence, and concluded they had been fired from the same weapon; also, a slug taken from Mr. Flores compared to one taken from Mr. Edwards led to the conclusion they had been fired from the same weapon.

Witness David Porter testified that he had been/was an inmate in the Allegan County Jail, and had met and spoken with Mr. Derring two months previously; he said Mr. Derring admitted to having shot the three victims, as well as having shot a Mexican named 'Torres' (TT III, 253-256). Porter continued in his testimony that he was expecting a deal from the prosecution for his testimony, but then, while still on the witness stand, declared that he had just lied about Mr. Derring, shouted that Mr. Derring should be freed, and that Mr. Derring did not do the crime; he was removed from the courtroom (TT III, 261-264). Porter's testimony was nevertheless utilized by the prosecution in its closing argument, and is the basis of Mr. Derring's Issue IV.

Mr. Derring did not testify. His statement to the police revealed that on at least ten occasions Mr. Derring denied any involvement in the shootings.

Mr. Derring was convicted as charged, and sentenced as decribed above.

8.

ISSUE I

THE TRIAL COURT'S ALLOWANCE AND ADMISSION OF HEARSAY--PURSUANT TO THE MRE 804(b)(6) "CATCHALL" PROVISION--FROM THE UNAVAILABLE (DECEASED) DECLARANT WITHOUT SUFFICIENT INDICIA OF RELIABILITY, WAS AN ABUSE OF DISCRETION WHICH DENIED MR. DERRING OF HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO A FAIR TRIAL.

Standard of Review

A trial court's decision concerning the admission of evidence is reviewed for an **abuse of discretion. People v. Snider**, 239 Mich App 393, 419; 608 NW2d 502 (2000); however, legal questions relative to the interpretation of the specific evidentiary rule should be reviewed **de novo.** see, for example, **People v. Carpentier**, 446 Mich 19, 60, n 19 (1994).

Preservation of Issue. The issue was properly raised and preserved in the trial court. (Motion transcript, 9/13/00, at 4-9).

Analysis

The four witnesses (Green, Lawrence, Jones and Segelstrom) allowed to present the hearsay statements of Dustin presented highly prejudicial evidence against Mr. Derring. The specific evidentiary rule at issue, MRE 804(b)(6), the so-called "catchall" provision, provides an exception where the declarant is unavailable, that reads:

> A statement not specifically covered by any of the foregoing exceptions but having equivalent guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact, (B) the statement is more probative on

> the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts, and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

Circumstantial guarantees of trustworthiness are required to exist or the proffered evidence, otherwise violative of a defendant's right to effectively confront the evidence against him, cannot be admitted. **People v. Lee**, 243 Mich App 163, 171-173; 622 NW2d 71 (2000); **People v. Welch**, 226 Mich App 461 (1997); **Ohio v. Roberts**, 448 US 56, 66; 100 S Ct 2531; 65 l Ed 2d 597 (1980); US Const, AM VI; AM XIV; Const 1963, art. 1, section 20. The further in time that a statement is made from the event described, thus giving the proposed witness more time to fabricate the contents of the alleged statement, the less reliable, generally, are the circumstantial guarantees for trustworthiness. For example, **People v. Gee**, 406 Mich 279, 282 (1979). The statements relating to the Flores murder spoken to Green demonstrably illustrate the potential problem the guarantees seek to avoid. Shortly after the murder Dustin told Green he had shot the person; however, at a later point in time, **after** a period of reflection, he changed his statement and shifted the culpability to Mr. Derring. At a still later point in time, approximately a month after the Flores shooting, Dustin told Nicole that Mr. Derring had shot someone. A some point in time after the Flores shooting,

Dustin apparently told Jessica that Mr. Derring had shot someone. Also, the comments heard by Segelstrom were at least three weeks after the Flores shooting. The Court of Appeals determined the statements possessed sufficient indicia of trustworthiness, concluding the trial court's findings that the statements were "spontaneous for the most part" (emphasis added), and did not "indicate a motive to fabricate or shift blame" (Slip opinion, p. 3; Trial Court Opinion attached hereto as Appendix B), are manifestly erroneous. it can clearly be seen that as soon as two days after the Flores shooting Dustin sought to shift the blame to Mr. Derring; in that, as the lower courts pointed-out, he was consistent. The admission of the statements from the non-testifying declarant were highly prejudicial, did not contain sufficient indicia of trustworhtiness to meet the legal requirements for admission, and in this case denied m.r Derring a fair trial. The convictions should therefore be reversed, and a new trial free of the error should be ordered.

9.

ISSUE II

THE TRIAL COURT'S ADMISSION OF THE PRIOR BAD ACT EVIDENCE CONCERNING THE PRIOR MURDER, WAS AN ABUSE OF DISCRETION WHICH DENIED MR. DERRING HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO A FAIR TRIAL.

Standard of Review

The trial court's decision to admit evidence is reviewed

for an abuse of discretion. People v. VanderVliet, 444 Mich 52; 508 NW2d 114 (1993), modified 445 Mich 1205 (1994); Snider, supra, at 419.

Preservation of Issue. The issue was addressed pre-trial (Motion, 9/13/00, at 12-14), and was raised and considered by the Court of Appeals in the appeal of right (Appendix A, at 4-5).

Analysis

The evidence of the Flores murder was admitted to provide evidence of motive for the instant murders. Motive is relevant and may thus be a proper purpose for the admission of similar evidence. However, other acts evidence, even if relevant to an issue other than a defendant's "propensity" to commit an offense, must not be such that the danger of undue prejudice substantially outweighs the probative value of the profered evidence. MRE 403; VanderVliet, supra, at 74-75. As pointed-out in Appellant's Brief below, the admission of evidence of the prior murder not only was highly prejudicial, but effectively placed Defendant-Appellant in the position where he faced having to defend against that murder as well. The Court of Appeals simply held as follows:

> "Given the very high probative value of the evidence concerning Flors' murder and the nature of the instant case, we canot find that the probative value of the evidence was substantially outweighed by any risk of unfair prejudice to defendant." (Opinion, p. 5).

The Court simply determined that the evidence was highly

probative (of motive), and therefore admissable, and did not adequately review the insufficent balancing by the trial court, nor did a proper balancing of its own, in order to reliably determine the prejudicial effect upon the defendant. The Court of Appeals apparently simply determined the evidence had to be admitted, without proper regard to the prejudicial effect. That decision is patently erroneous, and must be reversed.

10.

ISSUE III

MR. DERRING WAS DENIED THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL THROUGH COUNSEL'S NEGLIGENT ELICITATION OF DAMAGING INFORMATION.

Standard of Review

A claim of ineffective assistance of counsel is reviewed to determine if the representation was deficient and fell below an objective standard of reasonableness, prejudiced the defendant and deprived him of a fair trial. People v. Pickens, 446 Mich 298; 521 NW2d 797 (1994); Strickland v. Washington, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1980). A defendant must also overcome a presumption that the attorney's actions might be considered sound trial strategy. People v. Tommolino, 187 Mich App 14, 17; 466 NW 2d 315 (1991), lv den 439 Mich 837.

Preservation of Issue Not separately raised or preserved at trial, but raised in and considered by the Court of Appeals.

Analysis

Those accused of crimes are guaranteed the effective assistance of counsel; effective assistance includes the adequate preparation, investigation and presentation of substantial defenses, and protection of the defendant's interests. US Const. AM VI; AM XIV; Const 1963, art. 1, Section 20; Strickland, supra; Pickens, supra; see, also, Tommolino, supra; People v. Reed, 198 Mich App 639, 646; 499 NW 2d 441 (1993).

The Court of Appeals determined nothing in the record overcame the presumption of sound trial strategy on the part of Mr. Derring's trial counsel, and that there was, therefore, effective assistance of counsel. However, if counsel's actions or omissions are such that the proceeding is rendered fundamentally unfair and unreliable, thereby denying the defendant a fair trial, the actions cannot be allowed to stand. Pickens, supra; Strickland, supra. During cross-examination of witnesses Green, Judith Taylor, and Lawrence Taylor, counsel elicited that Mr. Derring had, shortly after the Flores murder, pointed a gun at him; that Ms. Taylor was "concerned" about Mr. Derring, and that Derring had given Edwards an "evil" look when Edwards asked him to get his gun from the car; that Mr. Taylor also saw an "evil" look from Mr. Derring. Counsel had a difficult job, and the odds against Mr. Derring were bad enough, in this most serious and heinous case. Counsel could have no valid reason, certainly none that would benefit Mr.

Derring, to elicit such opinion, and further add to the public and common revulsion at this tragedy. The references to "evil" were not proper, and the Court of Appeals' failure to adequately address and remedy that issue was reversibly erroneous.

11.

ISSUES IV and V

MR. DERRING WAS DENIED HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO A FAIR TRIAL THROUGH PROSECUTORIAL MISCONDUCT CONSISTING OF: A) UASGE OF THE PERJURED TESTIMONY OF MR. PORTER; AND B) SHIFTING THE BURDEN OF PROOF.

Standard of Review

A claim of prosecutorial misconduct is reviewed de novo, in context and on the record as a whole, to determine if the complained of conduct deprived the defendant of a fair trial. **People v. Bahoda**, 448 Mich 261; 531 NW2d 659 (1995).

Preservation of Issue. Neither instance was preserved at the trial level, but both were reviewed by the Court of Appeals.

Analysis

A prosecutor has a duty and the obligation to seek more than just a conviction; the prosecutor must seek justice and, in so far as reasonable, protect the rights of the accused. See, for example, **Donnelly v. Christoforo**, 416 US 637, 642; 94 S Ct 1868; 40 L Ed 2d 431 (1974); **Bahoda**, supra; **United States v. Young**, 470 US 1 (1985); **People v. Burrell**, 127 Mich App 721, 726; 339 NW2d 239

(1983).

A). In the instant case the jury was confronted with the strange episode of Mr. Porter; initially, Mr. Porter provided testimony purporting to relate confessions and admissions of Mr. Derring to both murder incidents. Porter the declared that testimony a lie and Mr. Derring innocent of the offenses. The testimony was not only directly inflammatory and highly damaging, but also indirectly damaging as Porter related that he received the comunications from Mr. Derring while both were lodged in the maximum security portion of the County Jail. Porter's self-described lie nevertheless became a fundamental portion of the prosecutor's argument, despite the prosecutor knowing that Porter's testimony contained outright lies, falsehoods and misrepresentations. The Court of Appeals erroneously deemed such argument proper (Opinion, at 6).

B). The Prosecutor further sought to shift the burden to Mr. Derring by eliciting from Detective Cain the fact that Mr. Derring, in his post-arrest statements, did not/could not explain his whereabouts before or after the homicide (TT IV, at 115-116). The Court of Appeals found no shifting of the burden, despite Mr. Derring not having testified at trial.

Mr. Derring had no burden of proof in this case. To suggest he did through such questioning was improper and

must be seen as misconduct which deprived him of a fair trial.

12.

RELIEF REQUESTED

WHEREFORE, your Defendant-Appellant, JAMASA Z. DERRING, prays this Honorable Court will grant him leave to appeal from the Court of Appeals November 2, 2001, decision.

Respectfully submitted,

ELLIOT D. MARGOLIS P-28078
Attorney for Defendant-Appellant
2304 E. 11 Mile Rd.
Royal Oak, MI 48067
(248) 547-7888

Dated: December 21, 2001

STATE OF MICHIGAN

IN THE SUPREME COURT

THE PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	Supreme Court No.
v.	Court of Appeals No. 224937
JAMASA Z. DERRING, Defendant-Appellant.	Allegan County Circuit No. 99-01128-FC

AFFIDAVIT EXPLAINING DELAY

Elliot D. Margolis deposes and says that this Delayed Application for Leave to Appeal could not have been filed within the 21-days following the Court of Appeals November 2, 2001, Opinion, as the transcripts and materials were sent to Mr. Derring by his prior appellate counsel after the Court of Appeals' Opinion issued, and the undersigned could not retrieve the materials from Mr. Derring and file the Application within the 21-day period.

I DECLARE THAT THE STATEMENTS ABOVE ARE TRUE TO THE BEST OF MY INFORMATION, KNOWLEDGE AND BELIEF.

Elliot D. Margolis

Dated: December 21, 2001

STATE OF MICHIGAN

IN THE SUPREME COURT

THE PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v.	Supreme Court No. Court of Appeals No. 224937
JAMASA Z. DERRING, Defendant-Appellant.	Allegan County Circuit No. 99-01128-FC

APPENDIX A

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMASA Z. DERRING,

Defendant-Appellant.

UNPUBLISHED
November 2, 2001

No. 224937
Allegan Circuit Court
LC No. 99-011228-FC

Before: Griffin, P.J., and Gage and Meter, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of three counts of first-degree premeditated murder, MCL 750.316(1)(a), and three counts of possessing a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to three concurrent terms of life imprisonment without parole for the murder convictions, and a consecutive two-year term for the felony-firearm convictions. Defendant appeals as of right. We affirm.

I

This case involves the shooting deaths of three young victims, sixteen-year-old Dustin Sherrell, his seventeen-year-old sister Darla Sherrell, and Dustin's friend Jonathon Edwards, all of whom were found shot to death in the Sherrell family residence on the afternoon of April 1, 1999. Defendant was a close neighbor of the Sherrell family, a friend to Dustin, and briefly had dated Darla. Defendant was observed at the Sherrell residence in the company of the three victims during the evening of March 31, and during the morning of April 1 the four were seen together at various places.

On February 20, 1999, Antonio Flores was shot and killed less than one-half mile from the Sherrell residence. Evidence introduced at trial indicated that Dustin had revealed to several people his and defendant's participation in the murder of Flores, and that defendant likewise had stated that he shot Flores. The police also discovered physical evidence linking defendant to the three murders, specifically bullets taken from the three victims' bodies that were linked to two guns that defendant possessed.

II

Defendant first contends that the trial court violated his constitutional right to confront witnesses and deprived him of a fair trial by admitting several hearsay statements purportedly made by Dustin, one of the murder victims, regarding his and defendant's participation in the

Flores murder. We review for a clear abuse of discretion the trial court's decision whether to admit evidence. *People v Sni* 239 Mich App 393, 419; 608 NW2d (2000).

A

The trial court admitted Dustin's statements pursuant to MRE 804(b)(6), the catchall exception to the hearsay rule applicable when the declarant is unavailable. The prosecutor had requested that the court admit the hearsay statements as proof of defendant's motive in killing the three victims. The residual hearsay exception, MRE 804(b)(6), states in relevant part that "[t]he following are not excluded by the hearsay rule if the declarant is unavailable as a witness":

> A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact, (B) the statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts, and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

In interpreting an identical hearsay exception applicable irrespective of the declarant's availability, MRE 803(24), this Court explained that circumstantial guarantees of trustworthiness must exist to satisfy a defendant's constitutional right to confront the witnesses against him. *People v Lee*, 243 Mich App 163, 171-173; 622 NW2d 71 (2000). In determining whether a statement possesses adequate indicia of reliability, a court must consider the totality of the circumstances surrounding the making of the statement, including (1) the spontaneity of the statement, (2) the consistency of the statements, (3) the declarant's lack of motive to fabricate or lack of bias, (4) the reason the declarant cannot testify, (5) the voluntariness of the statements, i.e., whether they were made in response to leading questions or made under undue influence, (6) the declarant's personal knowledge about the matter he discussed, (7) to whom the statements were made, e.g., a police officer who likely would investigate further, and (8) the time frame within which the statements were made. *Id.* at 178.

B

The trial court admitted the following four statements of Dustin pursuant to MRE 804(b)(6). Jessica Jones, who dated Dustin from January 1999 until two weeks before his death, testified that two days after the Flores murder she and Dustin were alone in his bedroom when she asked him if defendant was serious when he had stated on the night of Flores' murder that he was involved in a shooting, to which Dustin replied, yes.

Joseph Green, a cousin of Dustin and Darla who saw Dustin approximately three times each week, testified that about two days after the Flores shooting he spoke with Dustin in his bedroom while defendant and another of Green's friends also were present. Green stated that, in a conversation that "came out of nowhere," Dustin said that at a nearby intersection he had shot Flores from behind a tree, and that he and defendant then beat up a lady in the car with Flores "so she wasn't talking." Green recalled that defendant glared at Dustin after he made these statements. A couple days later in the presence of Green and defendant, Dustin advised Green that he had lied, and had not shot anyone.

Nicole Lawrence, a sixteen-year-old cousin of Dustin and Darla, testified that she and Dustin had a close relationship and spoke frequently. According to Lawrence, approximately two weeks before the triple murders she and Dustin discussed the Flores murder. While Lawrence and Dustin were alone at her house discussing the relationship between Darla and defendant, Dustin, who appeared serious, expressed his opinion that his sister and defendant should not be together because defendant was "a crazy type of person" who had "shot some [M]exican guy" when a robbery attempted by defendant did not happen "the way [defendant] wanted." Dustin did not tell Lawrence that he had participated in the shooting, or explain how he had obtained the information.

George Segelstrom, Jr., who had known the Sherrells for approximately six months at the time of the triple murders and often exchanged greetings with Darla and Dustin, testified that about one week before the murders he gave Dustin and Edwards a ride to a party. Segelstrom overheard Dustin saying to Edwards, "I can't believe he shot him," referring to Flores' murder. Segelstrom inquired who, to which Dustin replied defendant. Either Dustin or Edwards, who both appeared scared, further stated that the Flores shooting "was over some money or drugs or something," and Dustin expressed "that if they said anything to anybody . . . that he would shoot the family."

C

The hearsay declarations by Dustin, which reflect his involvement in Flores' murder, that he told several others about his and defendant's participation in Flores' murder, and that defendant had knowledge that Dustin revealed to others his and defendant's involvement in the murder, plainly tended to establish that defendant had a motive to kill the victims, thus satisfying subrule MRE 804(b)(6)(A). *People v Rice (On Remand)*, 235 Mich App 429, 440; 597 NW2d 843 (1999) ("Proof of motive in a prosecution for murder, although not essential, is always relevant."). Furthermore, in light of the absence of other evidence showing that Dustin participated in Flores' murder and, to defendant's knowledge, told others about his and defendant's involvement with Flores' murder, we agree with the trial court's observation that Dustin's statements constituted "the prosecutor's only evidence of motive." MRE 804(b)(6)(B).

After reviewing the totality of the circumstances surrounding Dustin's statements to Jones, Green and Lawrence, we find that these statements possessed sufficient circumstantial guarantees of trustworthiness. The trial court found adequate indicia of reliability on the bases that Dustin's statements were spontaneous for the most part, consistent, made in emotional states, made privately to friends in whom Dustin likely would confide, were consistent with a young person dealing with the emotions of a traumatic event, and did not indicate a motive to fabricate or shift blame. We cannot conclude that the trial court clearly erred in finding these factors, which properly tend to establish the statements' trustworthiness. *Lee*, *supra* at 178.

Furthermore, our review of the record discloses additional particularized guarantees of trustworthiness not mentioned by the trial court. First, the circumstances, including that Dustin was with defendant at the time Flores was killed and his demeanor immediately afterward supports the conclusion he had witnessed a traumatic event, indicate that Dustin spoke from personal knowledge when he made statements about his and defendant's involvement in the Flores murder. Second, the reason Dustin could not testify, because he had been murdered, militates in favor of admissibility and also supports the trial court's conclusion that admission of Dustin's statements served the general purpose of the court rules and the interests of justice.

MRE 804(d)(6)(C); *Lee, supra*. Third, two of the statements occurred within a couple days of the Flores murder, a time frame supportive of the statements' admissibility, while another of the statements occurred within four weeks of the Flores murder, a time frame also supportive of admissibility to a lesser extent. Additionally, the statements either occurred in the safety of Dustin's own bedroom or in the safe haven of Lawrence's home. *Lee, supra.*

In light of these circumstantial guarantees of trustworthiness, we cannot conclude that the trial court abused its discretion in admitting Dustin's statements to Jones, Green and Lawrence under MRE 804(b)(6). *Lee, supra*; *Snider, supra.*

After reviewing the circumstances surrounding Dustin's statements to Segelstrom, however, we are not so comfortable that these statements were trustworthy. At the time of the statements, Segelstrom was more than twice Dustin's age, and had known the Sherrell family only for six months. Segelstrom admitted that he and Dustin never had a heart-to-heart talk. Rather than making the statements in the confidence engendering settings of his own bedroom or the home of a lifelong confidant, Dustin made them in the back of Segelstrom's automobile en route to a party. Moreover, the statements contained blame shifting toward defendant, and included new allegations of threats by defendant to shoot Dustin's family. Because under these circumstances we cannot find that Dustin's statements to Segelstrom are so trustworthy "that the test of cross-examination would be of marginal utility," we conclude that the trial court abused its discretion in admitting Dustin's statements to Segelstrom. *Idaho v Wright*, 497 US 805, 820; 110 S Ct 3139; 111 L Ed 2d 638 (1990).

Nonetheless, we find the erroneous admission of the statements to Segelstrom harmless in this case because it is "clear beyond a reasonable doubt that a rational jury would have found . . . defendant guilty absent the error." *People v Mass*, 464 Mich 615, 640, n 29; 628 NW2d 540 (2001). Evidence established that defendant admitted shooting Flores, and was in the area of Flores' shooting at the time of the murder. Defendant had a motive to kill the three victims in an attempt to cover up his involvement in Flores' murder. Defendant was the last person seen with the victims shortly before their deaths. Defendant frequently carried two small handguns, which one witness identified as .22 and .25 caliber handguns, and shot them at junk behind the trailer where he lived. Flores, Edwards and Darla Sherrell all were killed with a .22 caliber firearm, while Dustin was shot with a .25 caliber firearm. A state police firearms expert testified that (1) .22 caliber bullets from Flores' and Edwards' bodies had been fired from the same gun; (2) a .25 caliber bullet removed from Dustin's head, a .25 caliber bullet removed from the head of a deceased dog buried in the Sherrell backyard, which defendant in March 1999 had shot after the dog was struck by a vehicle, and a .25 caliber bullet found in a bullet-riddled air conditioner behind defendant's residence, all were fired from the same gun; (3) the many fired .22 caliber cartridge casings found at the murder scene and a .22 caliber shell casing found behind defendant's residence all were fired by the same gun; and (4) a .25 caliber shell casing found under Dustin's body was fired by the same gun that had fired three .25 caliber shell casings found at defendant's residence.

This abundant evidence of defendant's guilt convinces us beyond any reasonable doubt that the admission of Segelstrom's hearsay testimony regarding Dustin's statements constituted harmless error.

III

Defendant also argues that the trial court improperly admitted prior bad act evidence of his involvement in the Flores homicide. Because we do not detect that defendant specifically objected to the admission of evidence regarding the Flores murder on the basis that it constituted improper character evidence under MRE 404(b), defendant has failed to preserve this issue for our review. MRE 103(a)(1); *People v Furman*, 158 Mich App 302, 329-330; 404 NW2d 246 (1987). We nonetheless briefly consider the issue, reviewing the trial court's evidentiary decision for a clear abuse of discretion. *Snider, supra.*

In applying the four-part test for determining the admissibility of prior bad acts under MRE 404(b), *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended on other grounds 445 Mich 1205 (1994), we note that defendant does not contest that the prosecutor introduced evidence of defendant's involvement in Flores' murder for a proper purpose, specifically to show defendant's motive in murdering his friends, not to prove defendant's generally bad character. MRE 404(b)(1). Furthermore, this evidence plainly had probative value tending to establish defendant's motive, a fact of consequence in this case. *People v Starr*, 457 Mich 490, 497; 577 NW2d 673 (1998); *Rice, supra.* Given the very high probative value of the evidence concerning Flores' murder and the nature of the instant case, we cannot find that the probative value of the evidence was substantially outweighed by any risk of unfair prejudice to defendant. MRE 403; *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (explaining that unfair prejudice does not mean "damaging," but encompasses a situation in which a danger exists that the jury will give marginally probative evidence undue or preemptive weight), modified on other grounds 450 Mich 1212 (1995). We lastly note that the trial court properly instructed the jury how to consider this evidence. *VanderVliet, supra* at 75. We conclude that the trial court did not abuse its discretion in admitting evidence of defendant's involvement in Flores' murder.[1]

IV

Defendant next asserts his trial counsel provided ineffective assistance when he elicited witness testimony damaging to defendant. Because defendant failed to raise this issue in a motion for a new trial or an evidentiary hearing, we may review defendant's argument only to the extent that the existing record contains sufficient detail to support his claims. *People v Sabin (On Second Remand)*, 242 Mich App 656, 659-659; 620 NW2d 19 (2000). After reviewing defendant's allegations, we find nothing in the record to overcome the strong presumption that defense counsel's questioning of the witnesses constituted sound trial strategy, which we will not second guess on appeal. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

---

[1] Furthermore, the firearm-related evidence of defendant's involvement in Flores' murder directly related to the identification of defendant as the killer in the instant case. *People v Hall*, 433 Mich 573; 447 NW2d 580 (1989). In *Hall*, the Supreme Court found that the defendant's possession of a sawed off shotgun during an unrelated offense was relevant and admissible to show that the defendant committed the charged armed robbery using a similar weapon. *Id.* at 580-583. The Court explained that the evidence was admissible under MRE 401 "quite apart from also being evidence of other crimes, wrongs, or acts under MRE 404(b)" because "the shotgun itself was equally as direct an item of evidence of defendant's commission of the charged robbery in this case as marked bills or identifiable jewelry would be in another." *Id.* at 583-584. In this case, the linkage of (a) firearms-related evidence connecting defendant to Flores' murder together with (b) the firearms-related evidence of the instant killings directly tended to prove defendant's identity as the triple murderer.

V

Defendant further claims that the prosecutor engaged in misconduct when she argued that the jury should believe the testimony of a jail inmate, who initially stated that defendant had confessed to the murders and then on cross examination averred that he had lied, and improperly used the jail inmate's testimony to emphasize that defendant likewise was lodged in jail under maximum security. Because defendant failed to object at trial to the prosecutor's alleged misconduct, our review of this claim is limited to our determination whether plain error occurred. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). We find no misconduct, and thus no plain error. The record reflects that the prosecutor in good faith sought to admit the jail inmate's testimony, *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999), and that during closing argument the prosecutor properly argued the evidence admitted at trial and reasonable inferences arising therefrom as they related to the prosecution's theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

VI

Defendant lastly contends that the prosecutor committed misconduct by attempting to shift the burden of proof to defendant to explain his whereabouts at the time of the murders. We find that the prosecutor properly questioned a police investigator regarding defendant's failure to provide the police solid details of his whereabouts after the triple murders, because once a defendant waives his constitutional rights and volunteers to speak with the police evidence of the defendant's demeanor and failure to answer particular questions may be admitted. *People v McReavy*, 436 Mich 197, 217-220; 462 NW2d 1 (1990); *Rice*, *supra* at 435-437. The prosecutor's questions did not shift to defendant the burden of proving his innocence, but properly attacked the credibility of defendant's theory that he was somewhere else when the triple murders occurred. *People v Fields*, 450 Mich 94, 106-107; 538 NW2d 356 (1995). We thus find no plain error arising from defendant's unpreserved allegations. *Schutte*, *supra*.

Affirmed.

/s/ Richard Allen Griffin
/s/ Hilda R. Gage
/s/ Patrick M. Meter

STATE OF MICHIGAN

IN THE SUPREME COURT

THE PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v.

JAMASA Z. DERRING,
Defendant-Appellant.
_____/

Supreme Court
No.

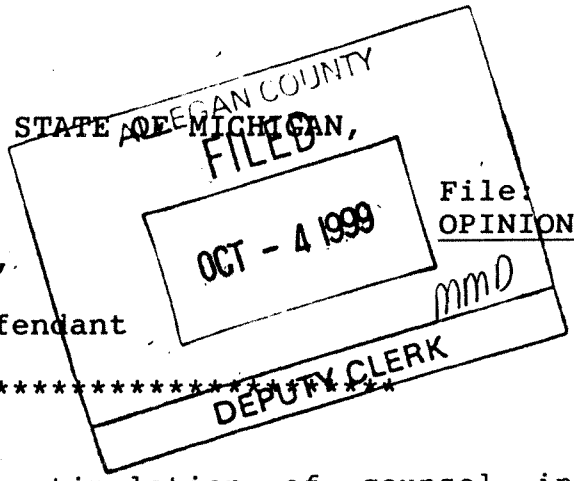
Court of Appeals
No. 224937

Allegan County Circuit
No. 99-01128-FC

APPENDIX B

STATE OF MICHIGAN

IN THE 48TH CIRCUIT COURT FOR THE COUNTY OF ALLEGAN



THE PEOPLE OF THE STATE OF MICHIGAN,

VS.

JAMASA Z. DERRING,

Defendant

File: 99-11228-FC
OPINION OF THE COURT

****

By stipulation of counsel in open court the testimony taken by the Court in File 99-11247-FC on the 12th day of August, 1999 was to be considered by the Court as the testimony to determine the prosecutors 404B and 804B(6) motions.

Defense counsel argues here that in this case the evidence should only be allowed for impeachment purposes if the defendant testifies. Counsel argues that this case is somehow different than the 99-11247-FC case. The Court agrees that there is a difference. In the preceding case the Court opinions went only to the issue of whether these statements qualified under 804B(6) and made no finding that they were admissible under 404B or for any other purpose. The Court did determine in the prior case that certain witnesses could testify as to observations of the defendant's conduct with a firearm as it related to defendant's propensity to use a firearm.

In this case the prosecutor requests use of the 804B(6) statements under 404B for purposes of establishing motive. The Court adopts its prior determination that the statements come in under 804B(6) and would specifically find the statements admissible for such purpose. These statements are highly probative of motive, and possibly the prosecutors only evidence of motive, and as such the probative value of the evidence substantially outweighs any unfair prejudice.

The testimony the Court previously determined admissible under 404B has little purpose in this case and would perhaps unfairly prejudice the defendant. This testimony as evidence might be used for impeachment purposes if an issue is created which makes it pertinent.

Testimony of escape attempts will be as previously determined admissible.

HARRY A. BEACH
Circuit Court Judge

October 4, 1999

STATE OF MICHIGAN

IN THE SUPREME COURT

THE PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v. JAMASA Z. DERRING, Defendant-Appellant. _____/	Supreme Court No. Court of Appeals No. 224937 Trial Court No. 99-01128-FC

PROOF OF SERVICE

Neil J. Leithauser deposes and says that he served copies of the **Delayed Application for Leave to Appeal and Notice of Hearing**, upon the following persons by **mailing** same via U.S. Mail, 1st-class postage fully prepaid, in the City of Troy, Michigan on **28th day of December, 2001**, in envelopes plainly-addressed as follows:

Attn: Appellate Section
Prosecutor's Office
Courthouse
113 Chestnut St.
Allegan, MI 49010

Clerk of the Court
Allegan County Circuit Court
Courthouse
113 Chestnut St.
Allegan, MI 49010

Clerk of the Court
Court of Appeals-Third Disrict
350 Ottawa, N.W.
Grand Rapids, MI 49053

I DECLARE THAT THE STATEMENTS ABOVE ARE TRUE TO THE BEST OF MY INFORMATION, KNOWLEDGE AND BELIEF.

Neil J. Leithauser P-33976

Dated: December 28, 2001